Supreme Court, U.S.
FILED
NOV 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-618

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

GRANITE ROCK COMPANY,
Petitioner,

v.

BUILDING MATERIALS AND CONSTRUCTION
TEAMSTERS LOCAL 216,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST AND CONCERN OF THE AMICUS

Amicus Curiae Associated Builders and Contractors, Inc. ("ABC") hereby submits this brief in support of the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.[1] ABC urges the Court to reverse the decision of the Ninth Circuit which has unjustifiably un-

[1] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Court Clerk.

dermined this Court's long held rule that a court must decide in the first instance whether two parties have contractually agreed to arbitrate a labor dispute before ordering the parties to arbitrate an issue which on its face does not arise from the contract. If allowed to stand, the Ninth Circuit's decision will disrupt established precedent under the Labor Management Relations Act.

ABC is a national trade organization representing more than 19,000 construction industry contractors and related firms. A significant proportion of ABC's members are non-unionized, "merit shop" contractors. ABC members are affected by judicial and administrative decisions construing the legitimacy of open shop operations, and by attempts to extend the scope of collective bargaining agreements to employers and employees who are not intended to be covered under such contracts. Thus, ABC members are vitally interested in the decision in the case below wherein the Ninth Circuit is permitting a union to obtain an arbitration over the existence of an allegedly "implied" covenant that restricts a signatory employer's right to maintain a non-union entity, notwithstanding the absence of any contract language to that effect. Those of ABC's members who have heretofore maintained legally separate union and non-union entities are faced with the prospect of having to arbitrate the existence and/or application of similar "implied" anti-double-breasting covenants even where the NLRB has explicitly sanctioned such operations, and even where no collective bargaining agreement prohibits such double-breasted operations. The Ninth Circuit's decision could permit an arbitrator to require one employer to apply the economic terms of its collective bargaining agreement to employees of a wholly separate and distinct non-union employer, thereby conflicting with settled federal labor policy. ABC is interested in a uniform and orderly application of the labor laws, and urges reversal of the Ninth Circuit's decision.

SUMMARY OF THE ARGUMENT

ABC fully supports the arguments put forth by petitioner Granite Rock in this Court, endorses those arguments, and amplifies upon them herein. By requiring a party to arbitrate a claim couched as a dispute "implicitly" arising under a collective bargaining agreement, without a showing that the claim falls within the scope of the parties' agreement, the Ninth Circuit has undermined the elementary rule that no party may be compelled to arbitrate an issue unless the court determines that the dispute is arbitrable under the parties' contract. According to the Ninth Circuit, any party to a collective bargaining agreement is entitled to a court order compelling arbitration of any asserted dispute between the parties, real or imagined, even disputes which cannot find their genesis in the collective bargaining agreement. According to the Ninth Circuit's standard, the courts must order to arbitration claims where the party seeking arbitration merely avers that the basis for the asserted dispute is implicit in the agreement, without even referring the court to any language in the agreement which even purportedly supports arbitrability. ABC respectfully requests the Court either to reverse the Ninth Circuit or to grant certiorari to address issues which are of paramount concern to the uniform application of this nation's labor laws.

ARGUMENT

The Ninth Circuit's Decision Compelling Arbitration Over The Existence Of An Asserted Implied Covenant Prohibiting Double-Breasting By A Unionized Company Conflicts With Federal Labor Policy.

Based on the fundamental notion of freedom of contract, this Court has recently reaffirmed the long held principle that the obligation to arbitrate a particular labor dispute is purely a matter of contract. *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986). *See also United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). These decisions hold that a court is powerless to compel a party to arbitrate a given dispute absent a contractual undertaking to that effect, and consequently, the courts are obligated to decide in the first instance whether a contractual obligation to arbitrate the asserted dispute exists:

> The first principle gleaned from the Trilogy is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he had not agreed so to submit." This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.

AT&T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 648-49 (1986) (citations omitted). It necessarily follows that the question whether a collective bargaining agreement creates a duty for the parties to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by a court on the basis of the contract entered into by the parties. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962).

Where the parties agree to submit all questions of contract interpretation to arbitration, the courts are "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *American Mfg. Co., supra*, 363 U.S. at 568. Although there is a strong presumption in favor of arbitration where the agreement contains a broad arbitration clause, *Warrior & Gulf Navigation Co.*, it is nonetheless the duty of the courts to interpret the agreement and to determine whether the parties intended to arbitrate the grievance presented. *AT&T Technologies, supra*, 475 U.S. at 649. The Court has held that the asserted claim sought to be arbitrated must in some fashion be based upon the contract. In *American Mfg. Co.*, the Court acknowledged that the union's claim that the company had violated *a specific provision of the contract*, coupled with the company's contention that it had not violated the particular provision, amounted to a "dispute between the parties as to the 'meaning, interpretation and application' of the collective bargaining agreement" requiring arbitration. *American Mfg. Co., supra*, 363 U.S. at 569. Similarly, in *Warrior & Gulf*, the Court held that a grievance claiming that the company exceeded its rights under the management rights' clause by contracting out work was arbitrable as the "grievance alleged that the contracting out was a violation of the collective bargaining agreement." *Warrior & Gulf Navigation Co., supra*, 363 U.S. at 585.

The Court has never instructed the lower courts to totally ignore the nature of the asserted dispute before ordering the dispute to arbitration. Indeed, the Court has directed that the dispute be judicially analyzed to ensure that it is one that the parties contemplated as being subject to the arbitration procedure.

In the case below, however, neither the Ninth Circuit nor the district court made any such assessment. Instead, the Ninth Circuit erroneously endorsed the district court's

determination that the parties' dispute as to whether any implied covenant even *existed* in the agreement satisfied the court's threshold arbitrability obligation. Consequently, the Ninth Circuit refused to even consider whether the asserted dispute—an implied covenant that the employer agreed not to establish another company without observing the economic provisions of the agreement—was governed by the contract. According to the decision of the Ninth Circuit, a party to an agreement is entitled as a matter of law to arbitrate literally any issue, including issues which are not founded on the agreement itself, simply by stating that some nebulous, unidentified and unsupported "implied" covenant in the agreement was violated. If allowed to stand, the Ninth Circuit's holding would render every conceivable issue, including issues that would otherwise not require arbitration, subject to mandatory arbitration.

Fortunately, other Circuit courts have not been as lenient in determining threshold arbitrability. The Third and Eleventh Circuits have rejected such novel attempts by parties to compel arbitration of otherwise non-arbitrable issues. In so doing, those Circuits have expressly evaluated the asserted disputes to ensure that the parties at least contemplated that such disputes be subject to arbitration. These Circuits refused to compel arbitration where the party seeking arbitration was unable to point to a provision in the agreement which on its face governed the dispute. *See Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709, 714 (11th Cir. 1987) (refusing to compel arbitration where the agreement contained no terms or provisions to be construed governing the asserted dispute) and *Morristown Daily Record v. Graphic Communications Union, Local 8N*, 832 F.2d 31, 33-34 (3d Cir. 1987) ("courts must carefully analyze the contractual language to determine whether a particular dispute is arbitrable").

Enabling an arbitrator to read implied covenants into any collective bargaining agreement will have a profound effect on virtually every collective bargaining agreement subject to the federal labor laws. In the present context, the Ninth Circuit's decision authorizes an arbitrator to find that an employer is prevented from engaging in double-breasting which the NLRB has expressly sanctioned. The decisions of other circuits, cited above, would avoid such a result by requiring the lower courts to permit arbitration only where there are contractual terms or provisions to be construed. The Court should resolve the conflict among the circuits by reversing the Ninth Circuit's decision, so as to avoid expanding the scope of collective bargaining to reach entities not properly within the coverage of union contracts.

Absent reversal by this Court, employers in the Ninth Circuit will be extremely reluctant to agree to *any* grievance/arbitration provision in a labor agreement out of fear that the union will allege, as was done in the case below, that some undefined "implied" covenant exists which requires arbitration. Such a result would be contrary to the Congressional policy favoring arbitration. Moreover, replacing Congress and the courts would be a system of arbitration not based on the specific language of the collective bargaining agreement, but on an arbitrator's personal belief as to whether various implied covenants exist in bargaining agreements. Thus, it is clear that the Ninth Circuit's decision operates to thwart, rather than to foster, national labor relations policies.

CONCLUSION

The Ninth Circuit's holding in this case threatens to disrupt the collective bargaining scheme that Congress and this Court have articulated to foster labor relations. If allowed to stand, the Ninth Circuit's decision will lead to a proliferation of demands to arbitrate asserted "implied" covenants, thereby expanding the scope of collec-

tive bargaining agreements beyond the intent of the parties and in a manner which would conflict with the statutory right to establish separate, non-union entities.

For the reasons expressed herein, this Court should grant the Petition for Writ of Certiorari and should reverse the decision below.

Respectfully submitted,

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November 10, 1988